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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 3

UNITED STATES OF AMERICA, APPELLANT

v.

NORTHERN PACIFIC RAILWAY COMPANY, NORTHERN PACIFIC RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF FOR THE UNITED STATES ON REARGUMENT

The company's brief on reargument, filed October 8, 1940 (hereinafter cited as N. P. 2d Br.), fails almost completely to meet the contentions made in the Government's main brief on reargument (cited as U. S. 2d Br.). In addition, the company's brief at a number of places misstates the record.

We shall endeavor to deal, as summarily as possible, with the basic errors contained in that brief, and thereafter with the specific matters in it which seem in most urgent need of correction.

I

THE COMPANY'S BASIC MISCONCEPTIONS

The company's position rests upon three basic errors which reach to the heart of the case.

First.—The company's brief throughout proceeds on the assumption that the Act of June 25, 1929, declares a common-law forfeiture. Yet, as we have shown at some considerable length (Point I, U. S. 2d Br. 60–79), that assumption is wholly without foundation. Our argument on that point is not met, and the legislative material adduced in support of our construction of the statute is entirely ignored. Indeed, the company in effect ignores everything in the Act except the word "forfeited," and proceeds to impress upon that word its own interpretation of a common-law forfeiture. This basic fallacy underlies the whole of the company's brief, and necessarily removes its arguments a considerable distance from the issues in the case.

Second.—The company's brief wholly ignores the circumstance that the granting Act and Resolution imposed any duties or obligations upon it. It assumes that the United States was obliged fully to perform a contract which the company might breach as it pleased. It assumes that the United States must pay compensation for an alleged breach of a contract, and yet is barred from inquiring into any breaches of that same contract on the part of the company.

Third.—The company's basic contentions are made in the face of the opinions in the *Oregon & California* litigation, 238 U. S. 393, 243 U. S. 549, to which the attention of the Court is again invited. Those decisions are more than interpretations of a particular grant; they are lucid statements of the proper approach to cases of this character. In several particulars they control the decision here.

1. Here, as in the *Oregon & California* case, the company is attempting to construct an argument based on the inviolability of vested rights "by pushing into view the rights conferred by the granting acts and putting out of view the wrongs committed by [the company]." 243 U. S. at 559.

2. Here, as in the *Oregon & California* case, the company is in substance attacking the wisdom of the provisions of the Resolution of 1870. But "granting the obstacles and infirmities, they were but promptings and reasons for an appeal to Congress to relax the law; they were neither cause nor justification for violating it." 238 U. S. at 423.

3. Here, as in the *Oregon & California* case, the company asks that its violations of law—violations extending virtually to every restrictive provision of the grants—be disregarded. To do so "would be in effect to declare that covenants violated are the same as covenants performed—wrongs done the same as rights exercised—and, by confounding these essential distinctions, give to the transgres-

sion of the law what its observance is alone entitled to." 243 U. S. at 561–62.

4. Here, as in the *Oregon & California* case, the company attempts to defeat a consideration of its own wrongs by asserting defenses of acquiescence, waiver, and estoppel to prevent the enforcement of a legislative contract. But "the acts of Congress are laws as well as grants and have the constancy of laws as well as their command and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence, and estoppel * * *." 238 U. S. at 427.

II

SPECIFIC CORRECTIONS IN THE COMPANY'S BRIEF

The specific matters in the company's brief which require correction will be discussed under headings which follow those of the main brief for the United States on reargument.

I. D. THE 1929 ACT CONFERRED A NEW RIGHT

The company argues (N. P. 2d Br. 20–23) that the Act of 1929 conferred, not a new right, but a new remedy.

"We need waste no time on refinements upon the suggested distinction between rights and remedies," *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 141, for the reason that here there is no difference in substance. The fact of the matter is that prior to the Act of 1929, the com-

pany was "helpless" in the face of the withdrawals (N. P. Br. 10), whereas thereafter it could obtain compensation. For the rest, "legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." *The Western Maid,* 257 U. S. 419, 433. "It is quite incredible that such an unsubstantial distinction should find a place in constitutional law." Cf. *Davis* v. *Mills,* 194 U. S. 451, 456. When, as here, the right is unenforceable save as Congress may grant a remedy, Congress still has the power to condition the remedy. *McElrath* v. *United States,* 102 U. S. 426, 440.

II. CERTAIN DEFENSES NOT AVAILABLE TO THE COMPANY

1. The company argues (N. P. 2d Br. 15–16) that our contentions under Point II, to the effect that the defenses of waiver, acquiescence, and estoppel were not available to the company, are antithetical to our other contention (Point I (B), U. S. 2d Br. 70–73) that the ultimate determination intended by the 1929 Act was intended to be judicial.

We fail to recognize the antithesis. The Act directed that the matters be judicially determined on their merits, a result which would be prevented by the assertion of the defenses in question.

But the company urges (N. P. 2d Br. 12) that the 1929 Act "left the respective rights and obli-

gations of the parties exactly where they were under settled principles of law and equity."

If "settled principles of law and equity" includes the settled principle that railroad land grants are laws as well as grants, having the constancy and command of law, binding and obligatory upon all until repealed, and thus not subject to defenses of waiver, acquiescence, or estoppel, *Oregon & California R. R. Co.* v. *United States*, 238 U. S. 393, 427, then there is no dispute between the parties. Congress believed that principle to be applicable; the language in question from the *Oregon & California* opinion was incorporated by reference into the committee report (U. S. 2d Br. 82–83, 277–78). That is decisive of the entire controversy on this question.

2. The remainder of Point II (U. S. 2d Br. 85–111) was included simply to show that, even if for some reason not now apparent the land grants should be held not to be laws, or somehow subject to the defenses of waiver, acquiescence, or estoppel, then it would still be possible for this Court, without any legal or constitutional difficulty, to give effect to the purpose of Congress, and reach the result which Congress intended, *viz.*, a free and untrammelled inquiry, undeterred by technical considerations or unmeritorious defenses, into all the frauds of the company and breaches of contract which were disclosed to the Joint Committee.

The company argues however (N. P. 2d Br. 17), that Congress elected not to declare a forfeiture,

and that the United States is bound by the doctrine of election of remedies, citing *United States* v. *Oregon Lumber Co.*, 260 U. S. 290.

But the doctrine of election of remedies requires, first, that a remedy actually be undertaken and pursued to final judgment; and, second, that the remedy thus chosen be entirely inconsistent with the remedy sought thereafter. See *United States* v. *Oregon Lumber Co., supra*, at 294–95, 297, and cases there cited. Here, no remedy was ever elected; and there is no inconsistency at all between refusal to declare a common-law forfeiture (letting the company retain what it has) and refusal of counter-performance (saying that the company is not entitled to more). The decision cited has therefore no application here.[1]

III. B. FAILURE TO COMPLETE THE WALLULA-PORTLAND LINE WAS A SUBSTANTIAL BREACH

The company does not deny the application of contract principles, nor the soundness of the particular propositions submitted, nor the substantiality of this breach as a matter of contract law; it simply urges (N. P. 2d Br. 18–19) that, in the

[1] The decision seems, in any event, to be overborne in reasoning by the dissent (Brandeis, J., Taft, C. J., and Holmes, J.), and has never won the approval of the profession. See 36 Harv. L. Rev. 593; 23 Col. L. Rev. 380; 17 Ill. L. Rev. 614; 7 Minn. L. Rev. 244; 71 U. of Pa. L. Rev. 178. This case presents no occasion for its reexamination, but it should certainly not be extended to the markedly different issue here presented.

eighties, Congress elected not to declare a forfeiture because it deemed the completion of the Wallula-Portland line unnecessary.

But Congress was dealing with proposals for a common-law forfeiture, not, as here, with a refusal of counter-performance. It is one thing to say that the noncompletion of the Wallula-Portland line is insufficient reason to strip the company of all its assets; it is quite another to say that this admitted breach is ground for holding that the company should not receive more than it already has.

III. C. VIOLATION OF THE SALE AND PREEMPTION PROVISO WAS A SUBSTANTIAL BREACH

1. The company says (N. P. 2d Br. 46), "Section 10 of the Act of 1864 is specific in forbidding a mortgage 'by the said company on said *road.*' This language, by implication, authorizes a mortgage on the *lands.*" The argument then continues to the effect that the mortgage authorization in 1870 extended only to the additional lands then granted.

But this contention entirely overlooks the circumstance that the company did not need the 1870 Joint Resolution for authority to mortgage the *road;* such authority it already had by virtue of the Joint Resolution of March 1, 1869, No. 15, 15 Stat. 346 (App. 55). This Court has already recognized that the company was prohibited from

mortgaging its *lands* by Section 10 of the 1864 Act. See *McHenry* v. *Alford*, 168 U. S. 651, 667. What the company now urges is that when Congress authorized it to mortgage all its lands, the limitations placed on that authority were intended to apply only to the additional fringe of lands granted in 1870. Under this view, the bitter legislative controversy over the 1870 Joint Resolution could have been no more than an exercise in shadow boxing.

2. The company (N. P. 2d Br. 46) cites *Heath* v. *Northern Pac. Ry. Co.*, 38 L. D. 77, as sustaining the view that it was justified in denying preemption rights to settlers. That ruling, however, simply went to the question of enforceability; it only held that, title to the lands having passed from the United States to the company, the Department of the Interior would not enforce, nor promulgate regulations concerning, the company's obligation with respect to the preemption proviso.

III. D. VIOLATION OF THE FORECLOSURE PROVISO WAS A SUBSTANTIAL BREACH

1. Under this heading the company resumes its vigorous defense of the validity of the 1875 and 1896 foreclosures as conduits of title (N. P. 2d Br. 31–48).

As we stated in our main brief (U. S. 2d Br. 162–63), we do not question the succession of the Northern Pacific Railway Company to the rights

conferred by the granting Act and Resolution. The real question is as to the extent of those rights, and specifically, whether the alleged violations of the foreclosure sale proviso amount to a substantial breach of the company's contract. The company's argument deals primarily with its right of succession; it does not squarely meet our contentions as to deficiencies in performance.

2. The company asserts (N. P. 2d Br. 43) that the United States took no exception to the finding that the sales were made to the highest and best bidders where the lands were situated. To the contrary, that finding was very specifically objected to before it was made (R. 593, Objection 2).

3. The company then argues (N. P. 2d Br. 43) that the evidence does not support the Government's contention on this point. It is not perceived how this fact (if established, which we do not concede) is in any way relevant to the present inquiry, which concerns the sufficiency of the challenged subdivision of the bill.

III. E. THE COMPANY'S ILLEGAL DISPOSITION OF ASSETS WAS A SUBSTANTIAL BREACH

1. The company urges (N. P. 2d Br. 51) that "The United States, with full knowledge, has waived all rights, if any, it ever had." No record references are cited in support of this assertion, and we think that none are available.

2. *United States* v. *Union Pacific R. R. Co.*, 98 U. S. 569, is cited (N. P. 2d Br. 103) as a complete answer to this phase of the litigation. It may be questioned whether the approach of that opinion is law today after the *Oregon & California* litigation, 238 U. S. 393, 243 U. S. 549, or after the rulings in *Causey* v. *United States*, 240 U. S. 399; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; and *United States* v. *San Francisco*, 310 U. S. 16, which establish that pecuniary damage is immaterial where the United States sues to enforce the policy underlying a public statute.

But there is a further and even more conclusive answer. The *Union Pacific* case arose out of the Credit Mobilier scandals, and was brought by the United States for "the collection and payment of such moneys and the restoration of such property, or its value 'either to said railroad corporation or to the United States, whichever shall in equity be entitled thereto' ". This Court held that since the railroad company asked for no relief and since the United States was not injured, "no case for relief is made by the bill." The case is completely distinguishable from the present case in that here the company is seeking to recover from the United States and bases its right to recovery upon a contract which it has violated. Here the United States is not seeking to recover anything because of the illegal disposition of assets; it is simply setting up those facts as a defense to the

company's claim. Moreover, in the later decision of *Wardell* v. *Railroad Company*, 103 U. S. 651, 659, this Court held that a diversion of assets of the Union Pacific was a fraudulent proceeding "not only against the company, but also against the government, which had largely contributed to its aid by the loan of bonds and by the grant of lands."

III. G. THE COMPANY'S FRAUD IN CONNECTION WITH THE MINERAL CLASSIFICATION WAS A SUBSTANTIAL BREACH

1. The company argues (N. P. 2d Br. 55), "the United States affirms the classification so far as it benefited and repudiates the classification so far as it imposes an obligation." Granted that, in the ordinary case, a party seeking to rescind a fraudulent transaction must offer to do equity, the short answer is that no such obligation rests upon the United States when it is enforcing the policy underlying a public statute. When the leases made by Secretary Fall were annulled, the United States was granted relief without first compensating the lessor for its improvements. *Pan American Co.* v. *United States*, 273 U. S. 456. *Accord*: *United States* v. *Trinidad Coal Co.*, 137 U. S. 160; *Causey* v. *United States*, 240 U. S. 399. One who defrauds the public does so at his peril.

2. The company states (N. P. 2d Br. 54) that the United States "had complete knowledge, gained after full investigation, of all particulars

of the classification as early as 1908." This assertion is not supported by any record reference; the undisputed evidence shows that the United States had no knowledge of *the company's participation* in the fraud (U. S. 2d Br. 194–198).

IV. B. THE COMPANY MUST ACCOUNT FOR EXCESS VALUES RECEIVED THROUGH ILLEGAL WITHDRAWALS

1. The company's brief asserts (N. P. 2d Br. 57) that the adjustment of the grant "involves only determination of; first, the measure of the grant; second, acres received; and, third, whether the company had earned them." Nothing is said regarding the company's obligation to return lands or values received without authority of law, and a discreet silence is preserved as to the requirement of Section 6 of the 1929 Act that the court "shall determine what quantities in lands or values said companies have received in excess of the full amounts they were entitled to receive * * * through mistake of law or fact, or through misapprehension as to the proper construction of said grants, * * * and said excess lands and values, if any, shall be charged against said companies in the judgments and decrees of said court." Nothing could better illustrate the company's one-sided approach to the present litigation.

2. The company cites *United States* v. *Winona &c. R. R. Co.*, 165 U. S. 463, a suit to cancel certain patents alleged to have been issued by mis-

take. But that decision went off on the ground that the patents in question had been confirmed by subsequent legislation; and therefore so much of the opinion as is quoted by the company (N. P. 2d Br. 115–116) is clearly *obiter*.

3. The company urges (N. P. 2d Br. 59) "the utter impossibility of proof of loss to appellant arising out of transactions closed more than 50 years ago." All we are seeking here is to obtain the opportunity to prove our loss, denied us below on the company's motion.

V. B. 2. IN ANY EVENT, SUBSEQUENT RESTORATIONS SHOULD HAVE BEEN CONSIDERED

1. Under this heading the company makes an assertion which, if true, would be serious. It says (N. P. 2d Br. 61):

> We repeat and emphasize our objection to the injection on appeal of contentions not made below and therefore not passed upon by the master. Appellant's insistent use of erroneous figures in connection with this subject emphasized the importance of the rule that an appellate court will not consider matters which were not considered below.

The record does not support this charge, but completely refutes it.

(a) As a basis for contending that withdrawals were validated by subsequent restorations, the government brought out in its proof (Unprinted

Transcript of Evidence, pp. 159–61) that, in the second indemnity limits in Montana, an excess of lands appeared until 1904, a deficiency from 1904 to 1911 and an excess, due to subsequent restorations, in 1911 and 1912. Thereafter, the argument that, even if unsurveyed lands were to be ignored, subsequent surveys and restorations must in any event be considered was presented to the Master,[2] and was rejected by him. He said (R. 504): "The withdrawals having been invalid, the occurrence, subsequently, of an excess, would not legalize any particular withdrawal."

The Government's rights were meticulously preserved, not only by exceptions to the Master's report (R. 568–70, Exception XLIII, especially par. [i]), but also by objections to the proposed findings (R. 594, Objection 6 (b); R. 595, Objection

[2] In the brief filed before the Master on the adjustment phase of the case, the Government urged (p. 135):

"* * * Large areas of lands in these categories were restored, and such restorations increased the area of remaining lands available for indemnity. Altho there was no obligation on the Government to ever make any of these lands available for indemnity or for selection by the company, it did so. When, thereafter, parts of these lands were again withdrawn or other lands in the indemnity limits were withdrawn, the company had no cause for complaint so long as sufficient lands remained to satisfy the losses. The restorations operated to the advantage of the company while the valid withdrawals operated to its disadvantage, but about this the company could not complain so long as what remained was sufficient to satisfy all losses."

We shall be glad to make a copy of this brief available in case the Court should desire to examine it.

7 (b); R. 597–98, Objection 10; R. 598, Objection 12).

(b) Nor does the company support its assertion that erroneous figures have been used. The record is not appealed to, and the only reference cited is N. P. Br. 154. That does not establish the charge; it does not prove that any figures used by the Government are in any respect incorrect; it consists simply of an argument as to the meaning of availability. Our contentions on that phase of the case (Points V (A) and (B), U. S. 2d Br. 218–38) are nowhere met in either of the company's briefs.

2. An equally bold assertion appears at N. P. 2d Br. 62, where it is said that the statement that second indemnity limits were laid down only at the request of the company is incorrect. Again no record reference is cited; and again the record (R. 805) proves the correctness of the Government's statement.

The decision in 2 L. D. 511 is not to the contrary. That ruling did not deal with the laying down of second indemnity limits at all; it concerned the *withdrawal* of lands within those limits. Such a withdrawal the Department refused to make because at the time, in 1883, it did not appear that resort to those limits would ever be necessary. Four years later, as we have shown, the practice of withdrawing indemnity lands was stopped, 6 L. D. 77, 92–93; and in 1901 it was

authoritatively demonstrated that all the indemnity withdrawals for the benefit of the company had been illegal. *Hewitt* v. *Schultz,* 180 U. S. 139.

V. B. 3. WITHDRAWALS ONLY INVALID TO THE EXTENT OF THE DEFICIENCY

The company (N. P. 2d Br. 62–63) apparently assumes that our argument on this point reduces itself to a mere question of valuation, and that the difference between the parties is whether the company shall be in effect entitled to select, or whether, as we urge (U. S. 2d Br. 236–38), it may have compensation for a resultant deficiency based on the average valuation of the entire withdrawal.[3]

But our contention has a broader application than simply valuation; it goes to the heart of the award. Take, for example, the Idaho withdrawal of March 1, 1898, discussed at U. S. 2d Br. 224–25: If, as we contend, unsurveyed lands are to be taken into consideration, that withdrawal was valid. If, as we contend in any event, subsequently surveyed or subsequently restored lands are to be taken into consideration, that withdrawal was valid. Only if both these contentions are rejected

[3] Our contention was predicated on the view that the gravamen of any injury suffered by the company was not the curtailment of the right to select but the occurrence of a deficiency. Even the Master came to the conclusion that this was the effect of the *Forest Reserve* case (R. 497–99), stating (R. 499) that "the grant of indemnity may become in the last stage a grant of quantity and not of quality."

can this withdrawal of 163,280 acres be held invalid—and then only because it created a deficiency of some 5,600 acres. But for this deficiency of 5,600 acres the court below awarded compensation for 19,680 acres. Obviously, such a ruling cannot be supported.

V. C. 6. THE AWARD CANNOT BE SUSTAINED AS TO 45,178 ACRES OF INDEMNITY LANDS FOR WHICH PATENTS ARE DIRECTED TO ISSUE

Here again (N. P. 2d Br. 64) the company charges that the United States is raising on appeal questions not raised below, saying that the Government below conceded the company's right to patent for these lands.

This overlooks that the proof on the adjustment phase necessarily conformed to the issues as then framed. Every subdivision charging fraud or breach of contract had been stricken from the bill, and the United States was obliged to proceed on the assumption that the company was entitled to compensation. None the less, the basic point was preserved by exceptions to the Master's second report (R. 576, Exception LVIII), and by objections to the proposed findings (R. 594, Objection 6 (a); R. 597–98, Objection 10; R. 598, Objection 12). And the objection as to lack of a proper tract-for-tract designation was likewise made (R. 600, Objection 22).

V. E. 1. NO DEFICIENCY IF WALLULA-PORTLAND LINE HAD BEEN CONSTRUCTED

Here the company (N. P. 2d Br. 65) admits that the objection was raised before the court below, but argues that it should have been taken before the Master.

But the basis for the contention had already been stricken, and the Master in his first report had professed himself unable to see how failure to construct the Wallula-Portland line could have any relevance to the adjustment of the grant (R. 386). When that position was sustained by the court, it would have been perfectly useless to have raised it before the Master again. The United States duly excepted to the striking out of the challenged subdivisions (R. 412–14), and raised the objection again when proposed findings were before the court (R. 595, Objection 6 [d]). It is not perceived how its rights could have been more sedulously guarded.

V. E. 2. NO DEFICIENCY BECAUSE NO SHOWING THAT COMPANY WOULD OR COULD HAVE SELECTED OR OBTAINED SUCH LANDS

1. Again, the company asserts (N. P. 2d Br. 65), "We do not find that this point ever was raised below, having been first presented by assignments 42 and 43 in this Court. It certainly was not presented to the Master, nor passed upon by the District Court." But the present contention is explicitly set out (R. 595–96, Objection 7 [c])

as a reason for objecting to the proposed findings. The point was also raised before the Master.[4]

2. On the merits, the company's contentions are completely answered by *Hewitt* v. *Schultz*, 180 U. S. 139, which held squarely that a withdrawal of lands within the indemnity limits for the exclusive benefit of the company was illegal and unauthorized. Yet the effect of the decree below is to recognize just such an illegal withdrawal. It is no answer to this argument to cite the *Forest Reserve* case; that does not question the *Hewitt* v. *Schultz* ruling, but simply adds

[4] See the Government's brief, from which the following excerpts are quoted (pp. 252, 253):

"* * * If this Court should now hold that the withdrawals of indemnity lands made by the Government for its own purposes are not valid and should hold that the United States is obliged to compensate defendants for all these lands, the result will be that the Company will have benefits to which it is not entitled under the provisions of the granting act but to which the settlers were entitled. The net result of the withdrawal made by the Government for its own purposes would be practically the same as if the withdrawal had been made by the Government for the benefit of the Company in the first place. This could not legally have been done (*Hewitt* v. *Schultz*, 180 U. S. 139).

* * * * *

"If, instead of passing the 1929 Act, Congress had restored all withdrawn lands defendants could not have obtained all of them under the contract. Defendants were obliged *under the terms of the contract* to submit to such depletions of the area as might result from acquisitions by settlers. They were not entitled to the benefits that would flow from the equivalent of a withdrawal of the land for their own benefit. * * *"

the qualification that the United States may not, *by its own act,* create a deficiency. The *Forest Reserve* case recognizes the supremacy of the settler in the indemnity limits, and the basic error of the court below on this point was that it disregarded the settler in favor of the company.

3. So far as the company's delay in making selections is concerned (see U. S. 2d Br. 253), it is to be noted that the facts there stated are not disputed. Nonetheless, the company singles out specific dates on which the area of surveyed lands was small (N. P. 2d Br. 66). But the situation in Idaho considered in our main brief was, as there stated, set out only by way of example. We might properly have added that between 1884 and 1900 there were in the second indemnity belt in Montana as later laid down from 421,343.70 acres to 671,603.83 acres of vacant surveyed lands which would have been available for selection had the company obtained the establishment of the second indemnity belt in Montana immediately after the road was definitely located in that state (unprinted Govt. Exh. 90). The completion of the mineral classification was not essential to demonstrate the need for a second indemnity belt in Montana.

And to complete the picture we might also have stated that, as shown by Government Exhibits 82, 85, 88, 90, 93, 95, 98, and 100 (unprinted), there were on December 31, 1897, immediately prior to the withdrawals of March 1, 1898, 929,005.99 acres

of surveyed lands in all indemnity limits of the grant as then laid down or which might have been laid down at that time, which had not been selected by the company.

CONCLUSION

For these reasons, as well as those set out in our main brief, it is submitted that the rulings below should be reversed.

Respectfully submitted.

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